quires no discussion to show that such returns will not make against inequality or evasion unless the same interests are the beneficial owners in like proportions of substantially all of the stock of each of such corporations. *Alameda Investment Co.* v. *McLaughlin,* 28 F. (2d) 81. *Montana Mercantile Co.* v. *Rasmusson,* 28 F. (2d) 916. *Commissioner* v. *Adolph Hirsch & Co.,* 30 F. (2d) 645, 646. *Commissioner of Internal Revenue* v. *City Button Works,* 49 F. (2d) 705. Affiliation on any other basis would not make against inequality or evasion. It would require very plain language to show that Congress intended to permit consolidated returns to depend on a basis so indefinite and uncertain as control of stock without title, beneficial ownership or legal means to enforce it. Control resting solely on acquiescence, the exigencies of business or other considerations having no binding force is not sufficient to satisfy the statute.

Judgment affirmed.

UNITED STATES v. MURDOCK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

No. 38. Argued October 23, 26, 1931.—Decided November 23, 1931.

1. A judgment of the District Court sustaining, on demurrer, a plea to an indictment, and the effect of which, if not reversed, will be to bar further prosecution for the offense charged, is within the jurisdiction of this Court under the Criminal Appeals Act, without regard to the particular designation or form of the plea, or its propriety. P. 147.
2. The offense of wilfully failing to supply information for the purposes of computing and assessing taxes, under the Revenue Acts of 1926, § 114 (a) and of 1928, § 146 (a), is complete when the information, lawfully demanded, is refused; and prosecution may thereupon be had without first determining, in proceedings to compel

answer, the question whether the witness's claim of privilege under the Fifth Amendment was well taken. P. 147.

3. To justify under the Fifth Amendment a refusal to give information in an investigation under a federal law in respect of a federal matter, the privilege from self-incrimination must be claimed at the time when the information is sought and refused and must be invoked as a protection against federal prosecution; danger and claim that disclosure may lead to prosecution by a State is not enough. P. 148.

4. In a prosecution for wilful failure to supply information for the computation, etc., of a tax (Revenue Acts, *supra*,) the claim that defendant was privileged to keep silent, by the Fifth Amendment, is a matter of defense under the general issue of not guilty; and the use of a special plea to single this question out for determination in advance of trial is improper. P. 150.

51 F. (2d) 389, reversed.

APPEAL, under the Criminal Appeals Act, from a judgment of the District Court sustaining a special plea in bar and discharging the defendant.

Solicitor General Thacher, with whom *Mr. Robert P. Reeder* was on the brief, for the United States.

The ascertainment of facts upon which to base a tax assessment is with propriety committed to the tax-collecting agencies. *Interstate Commerce Comm.* v. *Baird,* 194 U. S. 25, 42, 43; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447, 474, 477, 478, 486; 39 Harv. L. Rev. 697, 698. The internal revenue agent properly examined the witness in order to find out what persons received the twelve thousand dollars expended by the witness in 1927 and 1928, so that taxes might be imposed upon such persons. The recipients were subject to taxation even though the money had been paid to them for failure to enforce the laws. *United States* v. *Sullivan,* 274 U. S. 259.

The agent was entitled to seek judicial aid to compel the witness to testify, but was not required to do so.

There was nothing to suggest any reason for refusal to answer the questions other than that the witness had been

violating the gambling laws of Illinois and had been paying officials of the State for permission to do so.

A witness is not relieved from answering questions merely because he declares that to do so might incriminate him. *Mason* v. *United States*, 244 U. S. 362, 366, 367. The claim of privilege against self-incrimination must be weighed. In weighing it, the explanations given by the witness may be quite material, and in the present case they were conclusive, for the witness modified his broad claim and testified that he did not fear any prosecution under federal law.

The Constitution does not relieve a witness before a federal tribunal of the duty of testifying because he might thereby incriminate himself under the laws of a State. *Hale* v. *Henkel*, 201 U. S. 43, 68, 69; *Brown* v. *Walker*, 161 U. S. 591, 597; *Queen* v. *Boyes*, 1 B. & S. 311; *Jack* v. *Kansas*, 199 U. S. 372, 382; *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1050; *State* v. *March*, 1 Jones (46 N. C.) 526; Wigmore on Evidence, 2d ed., vol. 4, §§ 2251, 2258, pp. 830, 831. See *Counselman* v. *Hitchcock*, 142 U. S. 547; *United States* v. *Saline Bank*, 1 Pet. 100; *Ballmann* v. *Fagin*, 200 U. S. 186; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113.

We perceive no logical basis for the application of one rule in measuring the adequacy and scope of an immunity statute as a basis for compelling testimony that discloses acts criminal under state law, and the application of a contrary rule where, as in this case, it is apparent that incrimination is confined to offenses under state law. *In re Willie*, 25 Fed. Case No. 14692e; *Mason* v. *United States*, 244 U. S. 362, 364.

The claim of immunity as made at the hearing may not be enlarged after the hearing and when the witness is under prosecution for having refused to testify.

The offense denounced by the statute was complete when the witness refused to testify without giving an

excuse which was sufficient at law. He did not then offer a sufficient excuse. The circumstances show that there was none. There is nothing to support the suggestion of the District Court that there was a conspiracy to defraud the United States. Certainly the witness knew of no such conspiracy, for he swore that he did not have in mind any violation of federal law.

The decision is controlled not merely by the appellee's failure to claim incrimination under federal law, but upon a showing affirmatively made and incorporated in the special plea that there was no possible basis for any such claim. *Mason* v. *United States,* 244 U. S. 362.

The formal allegation in the special plea that the information withheld would have caused the appellee to be subjected to prosecution for violations of various laws of the United States is of no importance, because the plea incorporates a correct and authentic transcript of the questions asked and answers given before the revenue agent, and this transcript discloses that no claim was made of incrimination under federal law, and, further, that any such claim would have been utterly without foundation.

Messrs. Edmund Burke and *Harold J. Bandy* for appellee.

The case is almost identical with *Counselman* v. *Hitchcock,* 142 U. S. 547, and *Brown* v. *Walker,* 161 U. S. 591.

The transcript of the proceedings before the internal revenue agent shows that appellee's fear was well founded. The agent attempted to extract information from him showing that he had paid certain persons protection money in order that he might operate gambling machines in violation of law. If the money was paid for this unlawful purpose, he had no right to deduct the amounts from his taxable income; and if the information obtained from his testimony disclosed that he had made improper and

unwarranted deductions from his taxable income and had thereby defrauded the Government of tax, he would have been subjected to prosecution in a federal court for violation of certain penal sections of the Revenue Act. Moreover, inasmuch as he swore to his income tax returns, he could have been prosecuted in a federal court for perjury. In addition to this, if the testimony had shown that he acted in concert with the recipients of the money to conceal their identity in order that they might be saved from paying income tax, he could have been indicted and prosecuted jointly with them for conspiracy.

His refusal to answer was based upon solid fact, and he was protected in that refusal by the Fifth Amendment. He was the judge of whether his answers might tend to incriminate him. The courts should sustain the witness's claim of privilege unless it is clear that the evidence obtainable from his testimony could not by any possibility incriminate him. *Ballman* v. *Fagin,* 200 U. S. 186; *Internal Revenue Agent* v. *Sullivan,* 287 Fed. 138.

The indictment of appellee was premature. He was not guilty of refusing to supply information as alleged in the indictment, even if his answers would not have incriminated him. His claim of constitutional privilege asserted before the revenue agent was of no avail because the agent was vested with no judicial power and could not pass upon his claim of privilege. He could not have been adjudged guilty of refusing to supply information and of violating these sections of the revenue law until he had first been summoned and required to appear and be interrogated in the District Court as provided for by §§ 1122 (a) and (b) of the Revenue Act of 1926, and §§ 617 (a) and (b) of the Act of 1928, and until there had been a judicial determination of his claim of constitutional privilege and the court had decided the question adversely to him and commanded him to answer the questions. Section 1114 (a) of the Act of 1926, and § 146 (a)

of the Act of 1928, upon which this indictment is based are not complete in themselves. Although providing that persons who wilfully fail to supply information shall be punished, they do not set forth the procedure that the department must take in order to obtain the information. Section 1114 (a) of the 1926 Act must be read with § 1122 (a) of that Act; and § 146 (a) of the 1928 Act must be read with § 617 (a) of that Act.

There is no merit in the contention that appellee limited his claim of privilege to a danger of being prosecuted in a state court for violation of a state law. He could only assert his claim in a court of competent jurisdiction. Section 1122 (a) of the 1926 Act and § 617 (a) of the 1928 Act provided the proper and only procedure to be followed.

The truth of appellee's claim, as sworn to by him in his special plea, is admitted by appellant's demurrer.

Examination of the transcript of his testimony will show that in each instance when he refused to answer he covered the complete field of federal and state law and did not in any instance limit the grounds of his refusal. Whatever limitation seems to appear in appellee's answers was placed in his mouth by the attorney representing the department.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellee filed his individual federal income tax returns for 1927 and 1928, and in each year deducted $12,000 which he claimed to have paid to others. An authorized revenue agent summoned appellee to appear before him and disclose the recipients. Appellee appeared but refused to give the information on the ground that to do so might incriminate and degrade him.

He was indicted for such refusal and interposed a special plea averring that he ought not to be prosecuted under the indictment because, if he had answered the ques-

tions put to him, he would have given information that would have compelled him to become a witness against himself in violation of the Fifth Amendment and caused him to be subjected to prosecution in the court below for violation of various laws of the United States, as shown by a transcript of the questions asked and answers given which he included in his plea. The United States demurred to the plea on the grounds that it fails to show that the information demanded would have incriminated or subjected defendant to prosecution under federal law, and that defendant waived his privilege under the Fifth Amendment. The court overruled the demurrer and entered judgment discharging defendant.

The judgment necessarily determined that to require defendant to supply the information called for would be to compel him to incriminate himself and that therefore he did not unlawfully or willfully refuse to answer. Its effect, unless reversed, is to bar further prosecution for the offense charged. It follows unquestionably that, without regard to the particular designation or form of the plea or its propriety, this court has jurisdiction under the Criminal Appeals Act.[1] *United States* v. *Barber,* 219 U. S. 72, 78. *United States* v. *Oppenheimer,* 242 U. S. 85. *United States* v. *Thompson,* 251 U. S. 407, 412. *United States* v. *Storrs,* 272 U. S. 652, 655. *United States* v. *Goldman,* 277 U. S. 229, 236.

The offense charged is defined: "Who willfully fails to . . . supply such information [for the computation of any tax imposed by the Act] at the time or times required

[1] "A writ of error may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: . . .

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." 18 U. S. C., § 682. 34 Stat. 1246. See also 28 U. S. C., § 345 (2).

by law or regulations, shall . . . be guilty of a misdemeanor." [2] Other provisions authorize resort to the district courts to compel attendance, testimony and production of books.[3] While undoubtedly the right of a witness to refuse to answer lest he incriminate himself may be tested in proceedings to compel answer, there is no support for the contention that there must be such a determination of that question before prosecution for the willful failure so denounced. By the very terms of the definition the offense is complete at the time of such failure.

Immediately in advance of the examination, appellee's counsel discussed with counsel for the Internal Revenue Bureau the matter of appellee's privilege against self-incrimination and stated that he had particularly in mind incrimination under state law. And at the hearing appellee repeatedly stated that, in answering "I might incriminate or degrade myself," he had in mind "the violation of a state law and not the violation of a federal law." The transcript included in the plea plainly shows that appellee did not rest his refusal upon apprehension of, or a claim for protection against, federal prosecution. The validity of his justification depends, not upon claims that would have been warranted by the facts shown, but upon the claim that actually was made. The privilege of silence is solely for the benefit of the witness and is deemed waived unless invoked. *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113.

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[2] "Any person required . . . to . . . supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to . . . supply such information, at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor . . ." 26 U. S. C., § 1265. § 1114 (a), Revenue Act of 1926, 44 Stat. 116; 26 U. S. C., § 2146; § 146 (a), Revenue Act of 1928, 45 Stat. 835.

[3] 26 U. S. C., §§ 1257, 1258; 1122 (a) (b), Revenue Act of 1926, 44 Stat. 121. Superseded by 26 U. S. C., § 2617; § 617, Revenue Act of 1928, 45 Stat. 877.

The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters. The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients. Investigations for federal purposes may not be prevented by matters depending upon state law. Constitution, Art. VI, § 2. The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1050, 1068. *Queen* v. *Boyes*, 1 B. & S. 311, 330. This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. *Counselman* v. *Hitchcock*, 142 U. S. 547. *Brown* v. *Walker*, 161 U. S. 591, 606. *Jack* v. *Kansas*, 199 U. S. 372, 381. *Hale* v. *Henkel*, 201 U. S. 43, 68. As appellee at the hearing did not invoke protection against federal prosecution, his plea is without merit and the government's demurrer should have been sustained.

We are of opinion that leave to file the plea should have been withheld. The proceedings below are indi-

cated by a chronological statement printed in the margin.[4] After demurrer—not shown by the record to have been disposed of—and motions for a bill of particulars and to suppress evidence which were denied, a plea of not guilty was entered. The case should then have been tried without further form or ceremony. 18 U. S. C., § 564. The matters set forth in the plea were mere matters of defense determinable under the general issue. Federal criminal procedure is governed not by state practice but by federal statutes and decisions of the federal courts. *United States* v. *Reid,* 12 How. 361. *Logan* v. *United States,* 144 U. S. 263, 301. *Jones* v. *United States,* 162 Fed. 417, 419. *United States* v. *Nye,* 4 Fed. 888, 890. Neither requires such piecemeal consideration of a case.

[4]

1930		
January	23	Indictment returned.
February	6	Demurrer to indictment.
February	19	Additional special ground for demurrer.
February	25	Motion for bill of particulars.
May	27	Motion to suppress evidence and to restrain its use at trial.
		Motion for bill of particulars denied.
		Arraignment and plea of not guilty.
June	10	Argument on motion to suppress.
June	21	Motion to suppress denied.
July	1	Leave granted to file special plea.
		Special plea filed.
October	1	Demurrer to plea filed and hearing thereon set for October 13.
October	13	Second and third special pleas filed.
October	17	Demurrer to second and third special pleas filed.
		Hearing on demurrers.
October	18	Demurrer to first special plea overruled; demurrers to second and third special pleas sustained.
October	28	Opinion on demurrers.
1931		
February	3	Plea of not guilty withdrawn.
		Judgment for defendant on first special plea.
March	4	Appeal allowed.

A special plea in bar is appropriate where defendant claims former acquittal, former conviction or pardon, 2 Bishop New Criminal Procedure (2d ed.) §§ 742, 799, 805 *et seq.*, but there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact. That such a practice is inconsistent with prompt and effective administration of the law and is likely to result in numerous hearings, waste of courts' time and unnecessary delays is well illustrated by the record in this case. The indictment was returned January 23, 1930, the judgment before us was entered more than a year later, and it seems certain that more than two years will have elapsed after indictment before the case can be reached for trial.

Judgment reversed.

HARDWARE DEALERS MUTUAL FIRE INSURANCE CO. *v.* GLIDDEN CO. ET AL.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 4. Argued October 16, 1931.—Decided November 23, 1931.

Minnesota, by statute, requires all fire insurance companies licensed for business in the State to use a prescribed form of standard policy in which are provisions for determining by arbitration the amount of any loss (except total loss on buildings), when the parties fail to agree upon it. Where one party declines to select an appraiser, the other party may secure, upon due notice, a judicial appointment of an "umpire" to act with the appraiser selected by himself. The decision of this board, if not grossly excessive or inadequate, or procured by fraud, is conclusive as to the amount of the loss, in an action on the award, but does not determine the judicial question of liability under the policy. *Held:*

1. That the enforcement of such an award against an insurance company, which had declined to join in the arbitration, does not violate its rights under the due process and equal protection clauses of the Fourteenth Amendment, although it be assumed that the